No. 2635

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. E. ROBBINS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

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Filed this.....day of February, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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The plaintiff in error was convicted of sending an obscene letter through the mails and sentenced to three years in the penitentiary. Counsel for appellant assign as their main ground for reversal, the supposed misconduct of the District Attorney in addressing to the Jury certain alledgedly improper remarks and statements during the course of his argument, and also other remarks made to the complaining witness and the defendant, while they were on the stand.

In the brief of the appellant the proceedings surrounding the alleged misconduct are set forth, and it will be sufficient to refer to the page of the

brief and the specific remarks without setting forth at length the entire excerpts from the reporter's transcript contained in their brief.

On page 2 is found the following:

> "Mr. Preston: I guess you know all about her. You have half a dozen detectives out. I guess you know what it was.
>
> "Mr. Black: We object to that statement and assign it as misconduct, that we have half a dozen detectives out.
>
> "The Court: Well let the jury disregard that," etc.

On cross-examination of the defendant the following occurred:

> "Mr. Preston: I will ask you if it is not a fact that it is notorious that your wife never goes out with you and that she is always at home?
>
> A. No sir, that is not true.
>
> Q. Well, it used to be true.
>
> Mr. Black: I object to that as misconduct.
>
> Mr. Preston: I withdraw it.
>
> Mr. Black: I assign it as misconduct of the grossest kind.
>
> The Court: I would hardly say of the grossest kind. It can hardly be commended. *The jury will disregard it.*
>
> Mr. Preston: I said I know the doctor quite well and I do. That is all I said.
>
> The Court: Let us confine ourselves to the testimony given on the witness stand."

On page 4:

> "The District Attorney: And God knows there is nothing in his physical makeup that would appeal to any woman.
>
> Mr. Black: I except to those remarks."

Again, in the closing argument, quoted on page 5 of appellant's brief:

> "Mr. Preston: It is only necessary to look at him to see that lasciviousness crops out in every lineament of his countenance.
>
> Mr. Black: We take an exception to the language of the District Attorney."

ARGUMENT

ALLEGED MISCONDUCT OF DISTRICT ATTORNEY

The plaintiff in error relies mainly upon this alleged misconduct of the District Attorney to secure a reversal of the judgment and the granting of a new trial. It will be seen from a reading of the excerpts from the record contained in brief of plaintiff in error, that the alleged improper remarks merely called forth from the defense an objection or exception to the language used or the statement expressed. At no time during the course of the trial was an attempt made to have the so-called objectionable remarks withdrawn from the jury and the harm, if any, cured.

The rule is, as it properly should be, that the trial Court is the proper tribunal to look to for the protection against misconduct by the District

Attorney, and it is only in the event that a request to the Court to instruct the jury to disregard the statements, is refused, or the attorney persists in his remarks after being cautioned by the Court to cease, that legal objections will lie, and even then a reversal will not be granted unless the remarks were so prejudicial that the jury *must* have been influenced thereby. If the evidence was sufficient to warrant a jury in returning a verdict of guilty, and it cannot be shown with any certainty that the prejudicial remarks influenced the jury, it will not be ground for reversal that the remarks were improper. This is especially true if the Court has instructed the jury to disregard the remarks, or they are withdrawn by the one making the remarks.

If improper remarks or statements, objected to in the proper manner, are not ground for reversal if it can be shown that, although improper, they have not affected the verdict, it follows that the Appellate Court should not even be attentive to a complaint of misconduct when the record, as in this case, shows the remarks could not have been injurious, and especially so in view of the fact that no attempt to remedy the harm alleged to have been done by such misconduct, was made at the time and in the manner prescribed by the required procedure in such cases.

In this case the Court expressly instructed the jury to disregard the remarks made by the prosecutor about the detectives.

The remark made about the failure of the defendant to ever take his wife out with him was immediately withdrawn by the District Attorney himself, and the Court also expressly instructed the jury to disregard it.

In *Dunlop* vs. *United States,* 165 U. S. 486-498, 41 Law. Ed. 799, the Court said:

> "The action of the court was commendable in this particular, and we think this ruling and the immediate withdrawal of the remark by the District Attorney, condoned his error in making it, if his error should be deemed prejudicial error."

The other remarks assigned herein as misconduct were not persisted in after the attention of the District Attorney was called to them, and we believe this would show, if they were improper, that they were made inadvertently during the excitement of trial, and were not prejudicial to the defendant, or in the slightest degree whatever swayed the minds of the jury in the matter of their verdict.

On page 490, Vol. 2 of the Enclopedia of U. S. Supreme Court Reports, the following appears:

> "Every remark made by counsel outside of the testimony is not ground for reversal. If such was true comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial even the most experienced of counsel are occasionally carried away by this temptation."

Conceding, for the sake of argument, that the remarks were improper, still they cannot be relied upon at this late day to subject the verdict to reversal. The defense was privileged to object to the remarks during the course of the trial, in the regular manner, and have them made ineffective by requesting the Court to instruct the jury to disregard them and not to take them into consideration when deliberating upon their verdict, and, if through ignorance or inadvertence, the defense failed to take advantage of misconduct by proper appeal to the trial Court, it is now too late to rely upon this alleged misconduct of the District Attorney as a ground for reversal.

In *People* vs. *Amer,* 8 Cal. App. 137, at page 142, the Court, referring to a statement made by the prosecuting attorney during the course of the trial, said:

> "If the defendant was dissatisfied with said comment he should have requested the court to instruct the jury to disregard it. He contented himself, however, with a simple objection to the remark, and the language of the court in *People* vs. *Ye Foo,* 4 Cal. App. 730 (89 Pac. 450), is applicable here: 'The court was not asked to strike out the objectionable remarks nor does it appear that the court ruled on an exception. *It is but fair to require defendant's attorney, in case of objectionable remarks by the district attorney, to call the court's attention to them then and there and invoke the aid of the court to prevent the remarks from injuring the defendant before he will be allowed*

to urge the matter as error in this court. In such case the court will not hold the remark error upon which to reverse the case,' .People vs. *Shears*, 133 Cal. 159 (65 Pac. 295); *People* vs. *Beaver*, 83 Cal. 419 (23 Pac. 321), *People* vs. *Ah Fook*, 64 Cal. 383 (1 Pac. 347); *People* vs. *Kramer*, 117 Cal. 650 (49 Pac. 842); *Lunsford* vs. *Dietrich*, 93 Ala. 565 (30 Amn. St. Rep. 79, 9 South. 308)."

(Italics our own.)

In *People* vs. *Babcock*, 160 Cal. 537, at p. 545, the Court in reviewing certain improper remarks made by the prosecuting attorney, said:

"Furthermore, defendant is in no position to avail himself of misconduct of the district attorney in this matter. *He in no way invoked any action on the part of the trial court to obviate the effect of the statement, and the statement was of such a nature that any improper effect could have been avoided. He simply noted an exception to the remarks of the district attorney, as was the case in People* vs. *Sherer*, 133 Cal. 159 (65 Pac. 295), where the district attorney made an improper statement. This court said: 'This was improper, but its effect would have been removed if the defendant had asked the court to instruct the jury that it was improper, and to disregard it. He did not invoke the action of the court, but contented himself with excepting to the remarks of the district attorney,' and the judgment was affirmed."

(Italics our own.)

In *Moore* vs. *State* (Court of Criminal Appeals of Texas), 70 S. W. 89, the Court, in speaking of

certain statements made by the district attorney during the course of his argument, said:

> "At any rate, there was no requested charge on the part of appellant's counsel to have the court instruct the jury to disregard said argument; and in the absence of such request and refusal by the judge, and bill of exceptions reserved thereto, the language here used is not of that character authorizing a reversal."

In *State* vs. *Regan,* 36 Pac. 472, the rule laid down is in accordance with that laid down in the preceding cases. It is as follows:

> "Counsel for defendant excepted to it, but it does not appear that he moved to strike it out, or asked the court to instruct the jury to disregard it. Consequently, there is no foundation for any error in the premises."

We believe the rule laid down in the above cases was most clearly stated by this Court itself, in the recently decided cases of *Diggs* vs. *United States,* and *Caminetti* vs. *United States,* reported in 220 Fed. 545. This Court, at page 556, said:

> "It is the general rule that improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal, unless the court has been requested to instruct the jury to disregard them, and has refused to do so. 12 Cyc. 585. In *People* vs. *Shears,* 133 Cal. 154 (65 Pac. 295), it was held that, where the defendant did not invoke the action of the court to instruct the jury that it was improper, and to disregard it, but merely excepted to remarks of the district attorney, the

> impropriety is not ground for reversal of the judgment, upon conviction of manslaughter. A similar ruling was made in *People* vs. *Babcock,* 160 Cal. 537, 117 Pac. 549."

We respectfully submit to this Court a comparison of the present case with the Diggs-Caminetti cases, and also other cases cited or quoted from in point seven of the above-mentioned Diggs case, beginning on page 555 of Vol. 20 Fed. Rep. It will not require a close scrutiny to see that the remarks made in this case were of the mildest when compared with the remarks of counsel in the Diggs case, and especially in the Chadwick case. It therefore will follow that, if there was not sufficient cause to grant a reversal on this point in the Diggs case, it will avail naught for the plaintiff in error herein to rely upon these few innoxious isolated remarks or statements as grounds for reversal.

The case of *People* vs. *Fielding,* cited on page 6 of brief of plaintiff in error, and from which they quote at great length, is not quite in point in the present instance. In that case there was the most wilful misconduct on the part of the prosecuting attorney, and his remarks were flagrant and persistent. To compare a case of that character where the remarks were obviously prejudicial and persisted in after caution by the judge, with this case where the remarks were not only not prejudicial, but were isolated statements or questions made during the course of the trial, and were stopped once

attention was called to them, is, to say the least, rather far fetched.

A motion for a new trial was denied the plaintiff herein. As the trial judge has the best chance to weigh the improper remarks and to judge their effect on the jury, it is to be presumed that the remarks made by the district attorney in this case were not prejudicial to the defendant or the Court would have granted a new trial.

In *People* vs. *Conley*, 64 N. W. 325, at p. 326, the Court, speaking of improper remarks of counsel, said:

> "Ordinarily these matters must be left to the sound discretion of the trial judge, who hears the entire argument of counsel, and can better judge whether the language is justified by the argument of opposing counsel. *Courts of last resort will interfere by granting a new trial only in a case where the prosecuting attorney has so clearly departed from the evidence and the line of legitimate argument, that any reasonable person will conclude that the jury was prejudiced by it.*" (Italics our own.)

The record in this case shows that there was ample evidence to warrant the jury in finding the defendant guilty, and that the jury could not have been influenced by the so-called improper remarks or questions of the district attorney, and we further contend there is no ground for reversal since counsel did not proceed in the proper manner to have the remarks taken from the jury, and thereby

minimize any ill effects they might have created in the jurors' minds.

On page 8 of their brief, counsel for plaintiff in error quote from the recently decided case of *Myrick* vs. *United States*, 219 Fed. Rep. I, in order to sustain their contention that, a defendant voluntarily going upon the stand, does not thereby waive his constitutional privilege of testifying or not testifying so as to allow the prosecutor to comment upon, or criticise his refusal to testify to other matters within his knowledge.

On this point we believe it is sufficient to refer the Court to their decision upon this very same point in the Diggs case, which was decided two months after the Myrick case, and which takes the diametrically opposite view. As this Court has gone very fully into the question as shown by that portion of their able opinion on pages 547 to 551, we believe it would be mere surplusage, besides being presumptuous, to try to further elongate this Court's argument that a defendant appearing upon the witness stand in his own behalf, subjects his failure to testify to other matters, to comment and criticism.

In closing this discussion on misconduct, we would like to call the Court's attention to an excellent monographic note on the subject, appended to the decision of *People* vs. *Fielding (supra)*, upon which case the counsel for plaintiff in error place so

much stress. If counsel had read this note we do not think they would show so much inclination to charge misconduct in the present instance, realizing from the reading of said note that the grounds upon which misconduct in the present instance were based were most trivial, and likewise that their time to object to such misconduct was during the trial, and not upon appeal.

PRIVATE SEALED LETTERS, AND THE CHARACTER OF THEIR ADDRESSEE

Counsel for plaintiff in error base their ninth assignment of error upon the refusal of the trial Court to allow the defendant to show the alleged bad reputation of the recipient of the letter in this case.

Although they seemingly do not contend that an obscene letter should be tested as much by the character of the recipient, as by the contents of the letter itself, yet this necessarily follows from the position taken by them in contending that the character of the person receiving the letter is something for the jury to inquire into along with the letter itself. That this really is their position is further shown by the citing of the cases of *United States* vs. *Wroblenski,* 118 Fed. 495, and *United States* vs. *Wyatt,* 122 Fed. 316.

In other words, the contention is, that the offense charged in the indictment consists, not alone in the character of the letter mailed, but also in the char-

acter of the recipient of such missive, and, if the one receiving the letter is already so immoral and corrupt that the contents of the letter can make no *appreciable* difference in her moral status, then no offense is committed as contemplated by Section 211 of the Federal Penal Code.

Section 211 provides that "Every obscene, lewd, or lascivious book, pamphlet, * * * letter, * * * writing, * * * or other publication of an indecent character, * * * shall be nonmailable." Congress, in enacting this section, was not exercising a police power, but was acting under the power granted to it by Section 8, Article I, of the Constitution "to establish post offices and post roads." Under this section, Congress has the power to say what shall and what shall not be carried by the mails. It can arbitrarily declare what is mailable and what is nonmailable without reference to the public morals or public convenience, and no court will question the validity of its acts because they do not seem consonant with the public good.

> "If the use of the mails is a privilege which may be granted or withheld by Congress, Congress has the power to determine what shall be carried and what excluded. In the exercise of that power it has excluded explosives, liquids of various kinds, insect pests, except for scientific purposes, packages weighing over four pounds and many other articles. In determining that question Congress does not act for the protection of the rights of individuals merely; this has been wisely left to the states

by the national Constitution." (*U. S.* vs. *Musgrave,* 160 Fed. 700.)

Counsel for the plaintiff in error herein, together with the judges in the Wroblenski and Wyatt cases cited by them, are laboring under the delusion that Congress in enacting this statute, was endeavoring merely to prevent those already pure in mind from being corrupted, and not that "the primary object of this statute is to protect the mails from corrupt communications," and "The incidental purpose of the law is to protect public morals. (*DeGignac* vs. *United States,* 133 Fed. 197).

We do not see how the courts in the Wroblenski and Wyatt cases could discover any ambiguity in the intent and meaning of this section, so as to find it necessary to explain or construe it by saying that the character of the recipient of a letter was subject to inquiry by the jury in order to determine whether the letter was obscene or not. They were evidently of the impression that its primary intent was to protect the morals of those into whose hands these things would fall. We admit that this must have been one of the important reasons why the act was passed, but we nevertheless insist that its primary intent was to bar all obscene letters, literature, etc. from the mails because they were bad *per se,* and regardless of the effects they might have on particular individuals.

Congress has seen fit to bar all intoxicating liquors from the mails, and if we are to carry out the argument of the opposing counsel to its logical conclusion, it would follow that the mailing of a bottle of whiskey does not alone constitute a violation of the postal laws, but the test would be whether the recipient is or is not already in such an alcoholic state that the liquor cannot affect him. This will show the utter absurdity of their contention.

> "That the sole object of the act was not for the purpose of preventing the corruption of the minds of those to whom the letters or papers are sent and who are susceptible to such corruption is fully shown by the fact that it has been the uniform rule of the courts that communications of that nature addressed to government officials who, suspecting that the defendants are engaged in sending obscene literature through the mails sought information from them under assumed names by the use of what is commonly called 'decoy letters' are violations of the statute."

The term "obscene" is to be defined by seeking for its ordinary and general meaning, as understood by the public at large, and not by a construction placed upon it by using the standard of measurement of a particular person. This being so, it was proper for the trial Court to refuse to allow the defendant to bring the character of the addressee before the jury, but to test the obsceneness of the letter by its contents alone, they being

sufficient on its face to bring it within the ordinary meaning and acceptation of the term "obscene."

In the case of *United States* vs. *Musgrave,* 160 Fed. 700, the Court reviews all the authorities and refuses to follow the Wroblenski case, and holds

> "* * * that the object of Congress in enacting the statute was to absolutely prohibit the use of the mails to all persons for the transmission of matters which were lewd, lascivious, or indecent. It matters not what the relationship between sender and sendee is, or what the effect of the receipt of the article sent may have on the mind of the particular person to whom it is sent. If it is of such a nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try the case, have a tendency to deprave or corrupt the minds of reasonable persons and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute. In the language of Judge Phillips in *United States* vs. *Harmon* (D. C.) 45 Fed. 417:
>
> > " 'Laws of this character are made for society in the aggregate and not in particular. So, while there may be individuals and societies of men and women of peculiar notions and idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or decency is to be tested. Rather is the test, what is the judgment of the

> aggregate sense of the community reached by it?' "

And in the Wyatt case relied upon by the plaintiff in error, we find the Court saying:

> "Everyone who uses the mails of the United States for carrying letters or other purposes must take notice what in this enlightened age is meant by decency, purity and chastity, and what must be deemed obscene, lewd and lascivious." (*U. S.* vs. *Wyatt,* 122 Fed. 316, at page 317.)

See also

U. S. vs. *Lamkin,* 73 Fed. 459;

U. S. vs. *Moore,* 129 Fed. 159.

Plaintiff in error also contends that a distinction should be made between a private, sealed letter which one may read, and an open publication, which all may read.

We respectfully submit that there is no reason for such a distinction. When Section 3893 of the Revised Statutes was amended in 1888, so as to include "letters," there was some doubt whether or not a private, sealed letter was intended to be included, or whether it was intended that a letter which amounted to a publication was only to be within the statute.

This doubt was settled by the following cases, which held that a private, sealed letter was brought

within the inhibition of the statute by the amendment of 1888:

U. S. vs. *Chase,* 135 U. S. 255, 34 L. Ed. 117;
Grimm vs. *U. S.,* 156 U. S. 604, 39 L. Ed. 550;
Andrews vs. *U. S.,* 162 U. S. 420, 424, 40 L. Ed. 1023;
U. S. vs. *Andrews,* 38 Fed. 861;
U. S. vs. *Gaylord,* 17 Fed. 438;

and numerous other cases.

Section 211 of the Federal Penal Code is a complete re-enactment of Section 3893 of the Revised Statutes as amended.

It therefore follows, that if a private, sealed letter obscene in character, is prohibited by Section 211 from being deposited in the mails, anyone violating this section in this regard is deemed guilty, irrespective of the fact that such a letter will do less harm than would an obscene magazine or book. The section makes no distinction between one who mails an obscene letter, and one who mails an obscene periodical. How then can counsel for the plaintiff in error, with any show of reason, ask that a different test be applied in the case of one sending a private, sealed letter, and one sending a book or other publication? We do not see how the opposing counsel could—and we believe this Court will be unable to see it themselves—find any reason for reading into this section something which is

not there, and which Congress never intended to be there, or else they would, it is reasonable to presume, have expressly inserted it therein, viz: that a person sending an obscene private, sealed letter, shall be deemed less guilty than one who sends an obscene book or newspaper through the mails.

The trial Judge, unconsciously swayed by the effect a private sealed letter and an obscene book might have, will undoubtedly, in passing sentence, make the punishment greater or less as the case may be. But this is as near as one should ever get in differentiating between the two. In the eyes of the law, the two are placed on an equal plane and it is immaterial as far as the person's guilt is concerned, whether he sent an obscene notorious newspaper or a foul, obscene, private, sealed letter.

The seventh assignment of error is based upon the trial Court's ruling sustaining the objection of the United States attorney to a question put to a witness in order to impeach the complaining witness and the refusal of the trial Court to allow the recall of the complaining witness.

This is not appealable error, it being within the discretion of the Court to say whether the witness should be recalled or not.

If the defendant wished to impeach the complaining witness, he should have laid the proper foundation for such impeachment while the witness was upon the stand.

"The rule is, that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it." (*The Charles Morgan* vs. *Kouns,* 115 U. S. 69, 9 L. Ed. 316, 319.)

"* * * before those former declarations can be used to impeach or contradict a witness, his attention must be called to what may be brought forward for that purpose, and this must be done with great particularity as to time and place and circumstances, so that he can deny it. or make an explanation intending to reconcile what he formerly said with what he is now testifying." (*Ayres* vs. *Watson,* 132 U. S. 394, 34 L. Ed. 378, 381.)

"This rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given. * * * The rule is as generally established in this country as in England." (*Conrad* vs. *Griffey,* 16 How. 38, 14 L. Ed. 835, 839.)

See also the following cases:

Mattox vs. *U. S.,* 156 U. S. 246, 39 L. Ed. 412;

Clary vs. *Hardeville Brick Co.,* 100 Fed 918;

Gregory etc. vs. *Starr,* 141 U. S. 222, 35 L. Ed. 715;

Michigan F. & M. Ins Co. vs. *Wich,* 8 Colo. App. 418, 46 Pac. 687;

and numerous other cases.

The trial judge has the discretion to allow a witness to be recalled or not, in order to lay a proper foundation for his impeachment, and even though the request is reasonable, the refusal to grant it is not reviewable by the Appellate Court.

In the case of *People* vs. *Shaw,* 111 Cal. 171, where the circumstances were very similar to the present question, the Court said:

> "The request was certainly not an unreasonable one; and we apprehend that most courts would have allowed it. *But it was a matter of discretion of the trial court,* * * * *."

The trial judge has the discretion to determine whether a witness shall be recalled.

Greenleaf on Evidence, Vol. 1, Sec. 445, 16 Ed.;

Jones on Evidence, Vol. 5, Sec. 814, and cases there cited;

Jones on Evidence, Sec. 825;

Jones on Evidence, Sec. 846 (part of p. 850).

Even in this case, if the request of the defendant was reasonable, it was within the discretion of the Court to refuse it, and such refusal is not ground for appeal, and the counsel for plaintiff in error do not even suggest that such refusal showed that the discretion was in any way abused.

We fail to see any merit in either the second or the fifth assignment of error, and pass over them without further comment.

We respectfully submit there is nothing in the record entitling the plaintiff in error to a reversal of the judgment and a new trial.

Dated, February 7, 1916.

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